1968

State of Utah, By and Through Its Road Commission v. George Kendell and Irene H. Kendell, his Wife; Earl M. Kendell, and Flora H. Kendell, his Wife; Rulon E. Williams and Viola R. Williams. his Wife; and Utah Sand and Gravel Products Corporation, A Utah Corporation : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff-Appellant,

vs.

COMMERCIAL SECURITY, BANK, as Administrator of the Estate of GEORGE E. KENDELL, Deceased and IRENE H. KENDELL,

Defendants-Respondents.

Case No. 10834

BRIEF OF RESPONDENTS

Appeal From The Judgment Of The Second District Court For Weber County The Honorable John F. Wahlquist, Judge

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STATEMENT OF NATURE OF CASE

This is an eminent domain proceeding instituted by the State of Utah, by and through its Road Commission, involving commercial properties owned by defendants located at the mouth of Weber Canyon in the town of Uintah, Weber County, Utah.

DISPOSITION IN LOWER COURT

The case was tried before a jury on September 8, 1966, with the Honorable John F. Wahlquist presiding. The jury awarded respondents the sum of $22,500.00 for the 2.89 acres actually taken by appellant and $37,000.00 for damage to the land remaining after the taking, making a total award of $59,500.00. The Court entered judgment on the verdict on November 30, 1966. On September 20, 1966, appellant filed a motion for a remittitur or a new trial, in the alternative, which motion was denied by the Court on October 13, 1966. Appellant then filed another motion for a new trial on October 24, 1966, which was denied by the Court on January 26, 1967. Appellant then appealed from the judgment of the Court entered on the verdict.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the jury verdict and the judgment entered thereon by the Court.

STATEMENT OF FACTS

The State of Utah filed eminent domain proceedings in the District Court of Weber County, on June 24, 1964, naming George Kendell and Irene H. Kendell as defendants therein (R-1). George Kendell had just died on June 17, 1964, and Commercial Security Bank, as Administrator of Mr. Kendell's estate was

substituted as a party. (T-56, R-15). Process was served on respondent Irene H. Kendell and respondent Commercial Security Bank on June 25, 1964, and an order of immediate occupancy was signed by the Court on July 6, 1964 (R-4, R-51). These are the only parties involved in this appeal and the other named respondents in appellant's brief are in no way involved.

The subject property was purchased by the Kendells in 1939 and consisted of a total tract of property of 4.51 acres (T-55 & Exhibit B). Appellant actually condemned 4.18 acres consisting of 1.29 acres representing an existing right of way which appellant had through respondents' property and 2.89 acres to be taken by appellant for widening the existing highway and for an exit ramp (Exhibits B, 2-R). The 2.89 acres taken consisted mainly of property located on the west of Highway 89 except for a piece of property located east and adjacent to the existing Highway 89 right of way with approximate dimensions of 105 feet long by 7.5 feet in width on the north and 30 feet in width on the south (Exhibit B). Respondents were then left with a tract of property approximately .33 of an acre located to the east of the Highway 89 right-of-way and to the south of Highway 30 where both highways intersected prior to the improvements by the State .(Exhibits B, 3). For purposes of convenience the .33 of an acre not condemned by appellant will be referred to hereafter as the East property and the 2.89 acres condemned by appellant will be referred to as the West property.

At the time of taking, th eEast property consisted of motel cabins to the rear of the property, a service station providing gas, oil, lubrication and minor mechanical repairs, a grocery store and lunch counter, and an antique shop (Exhibit 2-I).

The West property consisted of a large tract of ground with frontage on Highway 89 of 736.3 feet and in a triangular shape of considerable depth on the south end of the property (Exhibit 3).

At the time of taking, both the East property and the West property were zoned C-2, which allowed the Kendells to have a service station, general store and other related commercial activities (T-8-9).

After the order of immediate occupancy was obtained, appellant proceeded to barricade off Highway 30 east of the subject property and rerouted Highway 30 to the south of the subject property and installed a fence running east and west 1280 feet from the barricade to the southwest corner of the East property (Exhibits 3, 2-A, 2-L, 2-M, 2-N). The fence then went north and parallel to Highway 89 from the southwest corner of the East property 827 feet, or approximately 300 yards (Exhibits 3.2-F, 2-H, and 2-J).

The East property, besides having a portion of it taken which necessitated removal of one section of gas pumps, was now completely fenced in and barricaded except for the small access road approximately 300 yards north of the subject property (Exhibits B,

3, T59-60). The West property was, of course, completely taken by appellant.

The jury awarded respondents the sum of $22,500.00 for the 2.89 acres actually taken and awarded respondents $37,000.00 as damages to the East property, making a total verdict of $59,500.00 (R-29).

ARGUMENT

POINT I

THE VERDICT OF THE JURY WAS WELL WITHIN THE EVIDENCE AND WAS NOT GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

The first case cited by appellant is the case of *Geary v. Cain,* 69 Utah 340, 255 P. 416, which involves an assault and battery charge on the person of a woman where a jury was quite generous in both actual and exemplary damages. This case, however, bears very little resemblance to the case before the Court. However, a very important rule of law which is material to the case under discussion is discussed at page 419 of the opinion as follows:

> "Ordinarily, if there is any substantial evidence to sustain a verdict in an action at law, this Court is powerless to set it aside. Such is the general rule reiterated and reaffirmed at almost every term of the court."

The other case cited by appellant is the case of *Jensen v. Denver & R.G.R. Co.*, 44 Utah 100, 138 P. 1185, which involved the death of a 14 year old boy while he was walking on defendant's railroad track. At page 1192 of the opinion the court lays down the following rule setting forth the conditions upon which a trial court may vacate a verdict and order a new trial:

> "But, before the court is justified to do that, it should clearly be made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated, or wholly misconceived or disregarded all the evidence ,and by so doing committed gross and palpable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice. Whether a new trial should or should not be granted on this ground, of necessity, must largely rest within the sound discretion of the trial court."

It would seem that according to appellant's own authorities the judgment of the trial court should be affirmed if there is any substantial evidence supporting the jury verdict. See also to this effect *People v. Swazey*, 6 Utah 93, 21 P. 400; and *Stephens Ranch and Livestock Co. v. Union Pacific Railroad Co.*, 48 Utah 528, 161 P. 459.

The verdict of the jury was well within the evidence as the following testimony will attest. Verna Aaron testified that she was working at the store at the time of the taking and described the place as "dead" after

the fence was installed around the property by appellant (T-46). She testified that prior to the installation of the fence that the Kendell's received business from Wyoming ranchers coming down Weber Canyon, tourists, local customers, and traffic going to and from Salt Lake City and Hill Air Force Base (T-47-48). She testified that after the fence was installed business consisted mainly of tourists running out of gas and purchasing small amounts of gas which could be handed over the fence to them, and also from the construction workers who were involved in the construction of the new freeway (T-48-49). When asked the question "And do you get any of the business from Hill Field traffic or traffic going from Salt Lake to Ogden?" she answered, "No, they don't know how to get in" (T-49). She then concluded her testimony by testifying that since the installation of the fence it was "just like you were in jail, fenced off" (T-49-50).

Earl Kendell testified that he had worked at the store and service station for a substantial period of time and that the piece of property taken by the State east of and adjacent to the Highway 89 right-of-way necessitated the removal of one island of gas pumps consisting of three individual pumps (T-51, 59, 60).

Adelbert R. Craven was called as an expert witness and testified that he had been a licensed engineer for the past 45 years and then described Exhibit 3, pertaining to the improvements made by appellant and the exact acreage involved in the taking (T-11-13).

In concluding his testimony he testified that he had been familiar with the property prior to the taking and that since the fence was installed he found it very difficult to get into the property and on one occasion had to go part way up Weber Canyon and turn around and come back in order to get into the property (T-12, 15).

The Uintah City Clerk testified as to the pertinent zoning ordinance and testified that both the East and West properties were in a C-2 zone, which authorized a service st ation, grocery store and similar commercial activities (T-8-9). There was further testimony to the effect that the West property was purchased by the Kendell's to be used as commercial property with the eventual establishment of a service station and related commercial activities thereon (T-51, 53).

Mr. G. T. Hone was called as an expert witness and testified that he had been in the oil business in numerous capacities since 1922, and had been an executive in the Sinclair Refining Company (T-20-21). He further testified that he either owned or leased 30 service stations in the Ogden area at the time of his appearance in court (T-21). He testified that he had been acquainted with the Kendell's since 1935 and had delivered gas and petroleum products to them since that time (T-22-23). He testified that the highest and best use of the East property was a service station and store site, which was the use they were presently being put to, and that at the time of the taking the market

value of the East property was from $60,000.00 to $70,000.00 (T-24-25). He testified that he was familiar with the improvements that had been made by appellant and that because of these the market value of the East property after the taking was nominal (T-25-26). In response to a question concerning the value of the East property after the taking, Mr. Hone testified as follows (T-26):

> "A. From our standpoint it wouldn't be worth anything because we couldn't keep an operator in it as far as operating a service station is concerned. There isn't enough business there. Now, Mr. Kendell's daughter has been operating the place and the gasoline business has gone down to practically nothing there.
>
> "Q. As an owner of service stations and as a rentor and lessor of service stations, would you have this property as a service station site yourself?
>
> "A. No, I wouldn't buy it. I wouldn't want to buy it for anything.
>
> "Q. Would you want to run it?
>
> "A. No."

Mr. Hone testified that the highest and best use of the West property was a truck stop and service station site and that the market value at the time of the taking was from $25,000.00 to $30,000.00 (T-23-24).

Earl Peterson was called as an expert witness and testified that he was a real estate appraiser and owner

of the Real Estate Exchange located in Ogden, Utah (T-32-33). He testified that the highest and best use of the East property was a service station and store site and that the market value at the time of the taking was $35,000.00 (T-34). He further testified that the market value of the East property after the taking was nominal (T-34).

Mr. Peterson testified that the highest and best use of the West property was a service station or truck stop and that the market value at the time of the taking was $40,000.00 (T-33).

Mr. Earl Jones was called as an expert witness and testified that he was the owner of Blackburn & Jones Company dealing in real estate and insurance and that he had been appraising property in Ogden for 21 years (T-38-39). He testified that the highest and best use of the East property was a service station and store site and that the market value at the time of the taking was $40,000.00 (T-40). He testified that the value of the East property after the taking was nominal (T-40). As a basis for his opinion he had a list of 42 sales of service station sites in the area during the previous six years (T-44).

Mr. Jones further testified that the highest and best use of the West property was a service station site and that the market value at the time of the taking was $35,000.00 (T-39).

Mrs. Irene Kendell was called as a witness and as a part-owner of the subject property. She testified that

the East property at the time of the taking was worth from $60,000 to $75,000 (T-58). She testified that the market value of the West property at the time of the taking was from $30,000 to $40,000 (T-57).

It seems clear that the verdict of the jury was well within the evidence introduced at the trial. Under the Utah cases and the evidence it seems obvious that the verdict was not against the weight of the evidence and was not the result of passion or prejudice.

POINT II

THE TRIAL COURT DID NOT ERR IN NOT GIVING AN INSTRUCTION PERTAINING TO THE RIGHT OF AN OWNER OF PRIVATE PROPERTY TO HAVE A PUBLIC THOROUGHFARE ADJACENT TO HIS PROPERTY.

It should be noted that appellant's argument on this point has no bearing on the West property since the 2.89 acres taken abutted Highway 89 at the time of the taking and subsequent improvements had no bearing on this parcel since it was completely taken.

Appellant's argument under Point II goes to the damages sustained by the East property which was left in respondents' ownership after appellant's improvements. It should be noted at this point that respondents are not contending that the State did not have the right to move Highway 30 slightly to the south of respondents' property but are asserting that the fenc-

ing off of respondents' property, causing a loss of access and the damages caused by the taking of the piece of property east of the Highway 89 right-of-way, are compensable damages under the Utah law. Ergo, appellant's contention on this point has little, if any, materiality and persuasive effect in the matter.

Appellant made no request to the trial court for the instruction referred to in its argument (R-28A). In cases where parties have failed to request particular instructions the Utah Court has refused to find error on the part of the trial court.

In the case of *Salt Lake & U.R. Co. v. Schramm*, 56 Utah 53, 189 P. 90, the Utah Supreme Court made the following observation at page 92 of the opinion:

> "If the plaintiff desired more specific instructions than given by the court, it became the duty of the plaintiff to frame and present them for the court's consideration. This the plaintiff did not do. . . Not having made a written request to the court to charge the jury in the particulars complained of, the court's failure to do so will not be regarded as error."

In *Taylor v. Los Angeles & S.L.R. Co.*, 61 Utah 524, 216 P. 239, the Utah Court made the following observation at page 242 of the opinion and thereafter listed numerous authorities in support thereof:

> "It is generally held that error cannot be based on the failure to give a particular instruction when no request therefor is made . . . "

In *State v. Valdez*, 432 P.2d 53, decided by this court on September 29, 1967, where the defendant made no written or oral request for an instruction on an included offense, and where this court agreed that the defendant was entitled to such an instruction if he had so desired, the court held that there was no prejudicial error for failure of the trial court to give such instruction in the absence of a request therefor. At page 54 of the opinion, Justice Crockett made the following observation:

> "If the defendant had desired that procedure, it was his duty to submit a proper request in writing, or at least to clearly indicate to the court orally that such was his desire."

And further, at page 55:

> "Although the record does show oral exception to the instructions relating to consideration of the evidence concerning motive and prior convictions of felony, the grounds now complained of were not mentioned. The purpose of exceptions is to assist the court in giving correct instructions. This purpose is best served by calling its attention to what is wrong and suggesting what is right. But the purpose of this procedure is not to permit a party to take an exception upon one ground, and then if he is convicted, use a different ground than he disclosed to the court to obtain a reversal. Accordingly, if the defendant has not stated a correct basis for objection to an instruction, he cannot wait until after he loses, and then complain about it for the first time."

It should be noted in the instant case before this court that appellant neither requested the instruction

it alleges should have been given or took an exception to the court's instructions pertaining to the point raised in its argument on appeal (R-28A, T-101).

For cases with similar holdings to the *Valdez* case see *State v. McNaughton,* 92 Utah 99, 58 P.2d 5, and *State v. Yee Foo Lun,* 45 Utah 531, 147 P. 488.

Appellant cites the case of *Robinette v. Price,* 74 Utah 512, 280 P. 736, which involved the closing of a portion of a street in Price, Utah. The court framed the issue of the appeal as whether or not the appellant had shown such a special interest in the portion of the street closed and discontinued as to entitle him to compensation. The court found that the appellant had "as ready ingress and egress" to his property as he had prior to the closing of the portion of the street. The court used the following language at pages 736-7 of the opinion:

> "Tenth Street running south from the highway on which the north boundary of plaintiff's parcel abuts was not closed or discontinued. It is alleged in the complaint that the closing of the portion of 10th Street which was closed prevented ingress and egress to and from plaintiff's property. But such claim is not supported by the evidence. The evidence, without dispute, shows that the highway on which plaintiff's parcel abutted affords him *as ready ingress and egress* (emphasis added) to and from the north boundary of his land as it did before the portion of 10th Street was closed and discontinued, and that the south portion of his parcel was not disturbed or interfered with in any particular."

This case hardly fits the Kendell case where a portion of the East property was actually taken which makes the Kendell case a proper subject of severance damages and also an almost complete loss of access by the fencing in of the Kendell property reducing a valuable commercial site to a tract of property of nominal value.

Appellant relies heavily on ***Springville Banking Company v. Burton,*** 10 Utah 2d 100, 349 P.2d 157, where a concrete island in the middle of Main Street in Springville was constructed eliminating U turns and left turns. The court held that this was not compensable under Utah law. The primary concern of the court was the fact that if the State had to pay for loss of access to abutting property owners every time an island was placed in a through highway, the expense would be prohibitive. This case, however, is not controlling in the Kendell case since even though islands were placed in the through highway in front of the Kendell property, such construction was never claimed at the trial as a basis for damages to the Kendells. The fencing off of a service station and store site and the actual taking of a portion of such property for State purposes is hardly analagous with a case involving the mere construction of an island in the middle of a highway.

The measure of damages in an eminent domain proceeding is based on the provisions of 78-34-10, Utah Code Annotated, 1953, and Article I, § 22 of the Constitution of Utah which provides as follows:

"Private property shall not be taken or damaged for public use without just compensation."

The following authorities are cited for the proposition that the Kendell family was properly awarded damages in the case at bar under Utah law, general law, and sound reason based upon balancing the equities of the public and the private land owner.

In the case of *Dooly Block v. Salt Lake Rapid Transit Company,* 9 Utah 31, 33 P. 229, where the respondents were owners of certain lots situated on 2nd South Street in Salt Lake City, and where appellants were trying to install railroad tracks, telephone lines and wires along the street which would have interfered with respondents' access to their respective properties; the Court found that the respondents "are the owners of equitable easements in fee of rights of access, ingress, and egress to their respective lots in front thereof in the street, and entitled to the free and unobstructed use of that portion of said street as a means of access, . . . " The Court went on to say that the right of access, light and air constitute the principal values of such property and that "such privileges are easements in fee, —incorporeal hereditaments,—and form a part of the estate in the lots." The Court further indicated that these rights "are appurtenances to the land which cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation."

The similarity of the *Dooly* case and the instant case is close since Mr. and Mrs. Kendell had exercised their easement of access from U. S. Highway 89 and U. S. Highway 30 since 1940. The *Kendell* case is substantially stronger since they had business property of a nature and type that used the access easement many times a day.

In *State v. Fourth District Court, et al.,* 94 Utah 384, 78 P.2d 502, where plaintiffs were owners of lots abutting Center Street in Provo City and defendants were proceeding to construct a viaduct on said street which would have raised the grade of the street in front of plaintiffs' properties and would have affected their access, the Court held (page 510 of the opinion) that if such construction constituted either a taking or a damaging of the property of the abutting landowners, then steps should be taken for proper compensation therefor.

In the leading Utah case of *Utah Road Commission v. Hansen,* 14 Utah 2d 305, 383 P.2d 917, where the State was taking 1.84 acres of an 18.06 acre tract of defendant's land located on the north side of 21st South Street, Salt Lake City, Utah, which property was used for defendant's auto wrecking business, and where a jury had awarded defendant $21,500.00 for the land taken and $3,400.00 as severance damages to the remaining land, the Court cited the *Dooly Block v. Salt Lake Rapid Transit Company* case with approval and reaffirmed its position that an established

easement of access by an abutting property owner is compensable under a condemnation proceeding. The Court further ruled in the *Hansen* case that an easement of access that was appurtenant to the property taken was a proper element of damages and that an existing easement to the remaining land not taken was compensable. The Court at page 920 defined an easement as follows:

> " . . . an easement of access contemplates a travelled way from the property to the highway."

It should be noted that the *Hansen* case is a 1963 case and is subsequent to the cases cited by appellant in its brief. It should further be noted that the Kendell situation fits the provisions of the *Hansen* case in that they had an easement of access from the two highways to their store and service station property since 1940.

The *Kendell* case is stronger than the *Hansen* case since part of the East property was actually taken necessitating the removal of a complete section of gas pumps in addition to the damages for loss of access.

In *Jacobsen v. Incorporated Village of Russell Gardens*, 201 N.Y.S. 2d 183, the New York Court held that the city had no right to remove the curb and erect barriers at the curb line which would block plaintiff's easement of access to the public street without compensation therefor.

In *Brownlow v. O'Donoghue Brothers*, 276 F. 636, 22 ALR 939, (District of Columbia Court of Ap-

peals), where the defendants owned a service station with two entrances to the property on Irving Street and one entrance on 14th Street, and where the commissioners of the District of Columbia proposed to close the 14th Street entrance and compel defendants to use only the Irving Street entrance, the Court held that defendants were entitled to have ingress and egress from their property on both streets and based its decision on the grounds that it was obvious than an entrance to a place of business such as defendants' business from a street over which there was much travel is far more valuable than one from a street where the traffic is light. The court said at page 941:

> " 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. . . . When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation he is deprived of his property.
>
> " 'It was further seen that he had certain rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it; . . . and that these rights, whether the bare fee of the streets was in the lot owner or in the city, were rights of property, and as such ought to be and were as sacred from legislative invasion as his right to the lot itself."

In 73 ALR 2d 652, at pages 656-7, it is stated as follows:

"The overwhelming weight of authority recognizes as a statement of general principle, that the right of access to and from a public highway is one of the incidents of ownership or occupancy of land abutting thereon, of which the owner cannot be deprived without compensation, whether the fee to the way is in the public or the abutter.

"When cases throughout the annotation are analyzed, it will become apparent that most of them involve the complaints of businesses, notably gasoline stations, which require *generous access* (emphasis added) for a profitable operation."

In 43 ALR 2d 1072, which is an annotation relating to an abutting owner's right to damages for loss of access because of the installation of a limited- access highway, the following observation is made at page 1074:

"Where an established 'land-service road' in which the normal right of access had already come into being, is converted into a limited-access way in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation, exactly as they would be if such rights were destroyed by any other type of construction."

And further, at page 1077:

"A difficult problem is presented when, because of the conversion of an ordinary highway into a limited-access way, the right of direct access is destroyed but there is available a means of indirect access either by other existing streets or by the construction of service or feeder roads

upon which the abutting landowner can move from his property to one of the authorized entrys to the limited-access roadway.

"The cases have apparently recognized that the landowner is entitled to compensation where his direct right of access is taken, even though other but less satisfactory, means of access are available."

CONCLUSION

It seems clear in the subject case that the jury awarded respondents what they felt was the market value of the West property at the time of the taking based upon the highest and best use as testified by respondents' expert witnesses. It is further evident that the jury, in awarding damages to the East property, considered the loss of the portion of the East property which necessitated the removal of a section of gas pumps, and further considered the loss of the easement of access which had existed since 1940 because of the fence installation. The jury obviously felt that the feeder road constructed by the State, with its entrance located 827 feet to the north of the subject property, was not sufficient and reasonable access for service station and store use. The verdict of the jury was well within the evidence and the verdict of the jury and the judgment entered thereon by the trial court should be affirmed.

Respectfully submitted,

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